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IN THE
Supreme Court of the United States

October Term, 1984

RONALD O. BUBAR, et al.,
Petitioners,
v.
AMPCO FOODS, INC., et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Did the Court of Appeals correctly follow and apply this Court's decision in Associated General Contractors v. California State Council of Carpenters in holding that petitioners lacked antitrust standing?

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Respondent, AMPCO FOODS INC.,[1] respectfully requests that the Petition for a Writ of Certiorari be denied.

STATEMENT OF THE CASE

A. Description of Proceedings Below

In 1978 and 1979, the Bubar petitioners made an unsuccessful attempt to arrange for financing and for additional equity investors to assist them in their efforts to obtain a small minority interest in the stock of respondent Rogers Foods, Inc. ("Rogers"). Because

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[1]Pursuant to Supreme Court Rule 28.1, Respondent AMPCO FOODS INC. discloses that in 1982, it changed its name to BASIC AMERICAN FOODS. BASIC AMERICAN FOODS is a privately held corporation, along with its wholly-owned operating subsidiaries, Basic Vegetable Products, Inc. and Sunspiced, Inc.

the Bubar petitioners were unsuccessful in their attempts to obtain financing and co-investors, and because respondent, Alexander & Baldwin, Inc. ("A&B") had been unable to locate other interested buyers, A&B sold certain of the assets of Rogers to respondent AMPCO FOODS INC. ("AMPCO").

In January, 1980, petitioners commenced an action in the United States District Court for the District of Idaho alleging that the asset acquisition agreement between A&B and AMPCO violated the federal antitrust laws. The complaint also asserted a common law claim against A&B for breach of an alleged contract to sell Rogers to petitioners. Following extensive document production by all parties and upon completion of the depositions of all party witnesses involved in pertinent discussions and negotiations, respondents A&B, Rogers and AMPCO filed motions for summary judgment on the breach of contract and antitrust claims. Following a hearing and review of the record, the district court held that petitioners lacked standing to raise any alleged violations of the antitrust laws. The district court also held that respondent A&B was entitled to summary judgment on the breach of contract claim. The Ninth Circuit affirmed the holdings of the district court from which the Bubar petitioners appealed.[2]

B. Summary of Background

In the summer of 1978, respondent A&B decided to sell certain of its subsidiaries and assets, including respondent Rogers. The Bubar petitioners, who comprised a part of the management group of Rogers, became aware of this decision in July, 1978, and began to investigate whether it would be possible for them to secure financing and identify other interested equity investors to enable them to purchase Rogers or some interest therein. Pet. App. A, 4a.

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[2]In the Ninth Circuit, the Bubar petitioners abandoned their claim that A&B had breached a contract to sell Rogers to petitioners.

In July, 1978, A&B also held discussions with Dalgety, a food company, concerning the possible sale of Rogers. In October of that year, Dalgety terminated those discussions. AMPCO App. A2. Subsequently, A&B held discussions concerning the possible sale of Rogers with a number of other companies. Pet. App. A, 6a; AMPCO App. B1-B4. A&B was unable to reach an agreement with any of these companies.

In late December, A&B stated that it would be willing to sell Rogers to the Bubar petitioners for a firm price of $13.5 million. AMPCO App. C3. A&B and the Bubar petitioners agreed to meet during the week of January 8, 1979. A&B informed Bubar that it would be meeting with other possible purchasers during that week. Pet. App. A, 6a.

Throughout the summer, fall and winter of 1978, the Bubar petitioners attempted to obtain financing and other equity investors. Id. at 7a. Petitioners never secured a written agreement of financing with any bank or other financial institution. Petitioners had not identified all of the potential equity investors and had not signed any agreement with any potential equity investor. Id. at 9a. For these reasons, the corporation which would have purchased Rogers and signed any purchase agreement had not been formed. Id. at 10a, 24a, 28a-29a. No determination had been made concerning the extent of the Bubar petitioners' interest in this unformed company; it only had been determined that the Bubar petitioners would receive a small minority interest, perhaps as small as 10%. No decisions had been reached concerning the manner in which this unformed corporation would operate or in what form the lenders and other equity investors would participate. Id. at 10a-12a.

A&B and the Bubar petitioners met on January 9, 1979 to discuss the possible sale of Rogers. Petitioners were unable to make a firm offer for Rogers. No agreement of any kind was signed at that meeting. Id. at 11a-12a.

Later that day, A&B met with representatives of respondent AMPCO. After several days of negotiations, AMPCO and A&B signed a letter of intent, pursuant to which AMPCO agreed to purchase assets of Rogers' potato division for $11.35 million. Id. at 13a. A&B suggested that the Bubar petitioners might wish to consider purchasing the onion and garlic division of Rogers. AMPCO App. C3-C4. Because petitioners failed to make a timely response, these assets were sold to another company.

On January 29, 1979, the Department of Justice advised AMPCO, Rogers and A&B that it wished to review the proposed transaction between AMPCO and A&B. A&B instructed the Bubar petitioners to provide the Department of Justice with whatever information it required and to otherwise cooperate fully. Petitioners traveled to San Francisco to meet with Justice Department attorneys and supplied sworn statements to the Department. During the course of the next two months, Rogers, AMPCO and the Bubar petitioners gathered and produced voluminous information to the Department. Upon completion of its thorough investigation, on March 13, 1979 the Department announced that it would not seek to challenge the sale to AMPCO, which closed on March 15. Pet. App. A, 13a-14a; AMPCO App. A3; B5; C1-C2, C4.

REASONS FOR DENYING THE WRIT

I. The Ninth Circuit Properly Followed and Applied this Court's Decision in Associated General Contractors

Petitioners recognize, as they must, that this case is controlled by this Court's recent decision in Associated General Contractors v. California State Council of Carpenters, 459 U.S. 519 (1983) (hereinafter "Associated General Contractors"). Petitioners do not argue that the Ninth Circuit erred in following Associated General Contractors or in identifying the factors which lower courts must examine in determining

whether a party has standing to bring a treble damage action under Section 4 of the Clayton Act. Petitioners contend only that the district court and the Ninth Circuit improperly evaluated the evidence associated with these four factors.

In Associated General Contractors, two affiliated unions asserted antitrust claims against a group of construction general contractors, alleging that the defendants had restrained competition in the market for construction contracting by coercing landowners and others to enter into construction contracts with non-union contractors. This allegedly reduced the business of union contractors which, in turn, diminished the business activities of the union plaintiffs. This Court held that the unions lacked antitrust standing and were not proper parties to bring treble damage claims.

In Associated General Contractors, this Court identified four factors which must be analyzed in determining whether a party has standing under Section 4 of the Clayton Act:

- First, "it is appropriate to focus on the nature of the plaintiff's alleged injury" and whether it is "the type that the antitrust statute was intended to forestall." 459 U.S. at 538.

- Second, the district court must assess the indirectness of the asserted injury and determine whether there are other parties who would have been more directly injured, if indeed an antitrust violation had occurred. Id. at 540-42.

- The district court must next examine the nature of the damage claims asserted and determine whether the injury alleged is speculative. Id. at 542-43.

- Finally, this Court instructed that the lower courts must analyze whether the claims

> asserted create either a risk of duplicative recovery or a danger of complex apportionment of damages. 459 U.S. at 543-45.

This Court in Associated General Contractors concluded that, taken as a whole, the evidence relating to each of these factors "weigh[ed] heavily against judicial enforcement of the Union's antitrust claim." Id. at 545.

Respondent AMPCO respectfully submits that the Court of Appeals made a thorough analysis of all relevant facts and properly evaluated these facts in view of each of the concerns expressed in Associated General Contractors. The Ninth Circuit correctly concluded that the undisputed facts, taken as a whole, warranted the district court's holding that the petitioners lacked standing. Because the Ninth Circuit correctly followed and applied this Court's most recent ruling on antitrust standing, and because there are no important legal or public issues at stake in this litigation, review by this Court is unnecessary.

A. The Court of Appeals Correctly Found that the Petitioners' Alleged Injury Was Uncertain and Speculative

Petitioners concede that they wished to acquire a minority interest in a corporation which they hoped to form to purchase the stock of respondent Rogers. Petitioners claim that they were wrongfully denied this opportunity as a result of respondent A&B's decision to sell certain assets to respondent AMPCO. Both the district court and the Ninth Circuit properly determined that petitioners lacked standing because they were unable to demonstrate "preparedness" to enter the business. Pet. App. B., 22b-31b; Pet. App. A., 34a-37a.

The record demonstrates that petitioners met with representatives of A&B on January 9, 1979, to discuss the possible sale of Rogers. It is undisputed that as of that date, petitioners had not secured any written agreement of financing with any bank or other financial institution. Pet. App. A, 9a. Despite months of efforts,

petitioners lacked the funds, financing and co-investors to complete the acquisition. For this reason, it was uncertain whether petitioners would ever be financially able to acquire any interest in respondent Rogers.

The Ninth Circuit also concluded that petitioners' alleged injury, if any, was speculative and inestimable. Petitioners do not contest the fact that they were not to be the only shareholders in this new company which would acquire an interest in Rogers. In fact, the record is undisputed that even if an acquisition on behalf of petitioners were feasible, the petitioners would receive only a small minority interest, perhaps as small as 10%. Pet. App. A, 10a-12a. Petitioners had not even identified who the other equity investors would be. Id. at 9a. On the basis of this record, the Court of Appeals properly determined that:

> [T]he speculative nature of the harm is increased because of the uncertainty that [the unformed corporation which was to acquire the Rogers stock] would ever have been financially able to become a competitor. The speculative nature of the harm is further increased because the plaintiffs were only prospective minority shareholders in the corporation that was to be the competitor, and the distribution of the stock and the relative stock rights [were] uncertain.

Id. at 39a.[3] For these reasons, the Court of Appeals

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[3]Respondent AMPCO has consistently argued that petitioners have neither alleged nor suffered any "antitrust injury," the first of the factors set forth in Associated General Contractors. This Court held in Brunswick v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977) that:

> . . . plaintiffs must prove "antitrust" injury, which is to say injury of the type that the antitrust laws were intended to prevent and that flows from that

(continued)

properly determined that petitioners' alleged injury was so uncertain and speculative that petitioners were not "proper [parties] to bring a private antitrust action." See Associated General Contractors, 459 U.S. at 535, n.31.

B. The Court of Appeals Correctly Found That the Petitioners' Alleged Injury Was Indirect and Remote.

Petitioners' alleged injury is indirect and remote because they were not financially prepared to acquire the Rogers stock. Pet. App. A, 9a. Even if petitioners had been prepared and actually formed the corporation they hoped would become a competitor in the market, any injury suffered by the petitioners would truly have been only an indirect result of the injury suffered by the corporation. Because petitioners had hoped to acquire an unspecified minority interest, the alleged injury is even more indirect. For these reasons, the Ninth Circuit properly concluded that petitioners' alleged injury was remote.

> which makes defendants' acts unlawful. The injury should . . . be "the type of loss at the claimed violation. . . would be likely to cause."

429 U.S. at 498-499.

Petitioners were not injured as the result of lessening of competition in the fresh or processed potato industries as alleged in their complaint. AMPCO App. D3-D4. Petitioners, if indeed they have been injured at all, would have suffered the same injury if any other company or group of former employees had purchased Rogers; they would have been foreclosed from the opportunity to purchase an interest in Rogers and to operate it profitably. As a matter of law, petitioners' claimed injury is not "the type [of injury] the antitrust laws were intended to prevent." See Bayou Bottling, Inc. v. Dr. Pepper Co., 725 F.2d 300 (5th Cir. 1984).

In both Blue Shield of Virginia, Inc. v. McCready, 457 U.S. 465 (1982), and Associated General Contractors, this Court emphasized that standing may be denied to the plaintiff before the Court where there were other identifiable parties with more direct injuries than the potential plaintiff. In Associated General Contractors, this Court denied standing to the unions, in part because construction contractors and subcontractors were more directly injured and were therefore more appropriate antitrust plaintiffs. This Court reasoned that:

> The existence of an identifiable class of persons whose self-interest would normally motivate them to vindicate the public interest in antitrust enforcement diminishes the justification for allowing a more remote party such as the Union to perform the office of private attorney general. Denying the Union a remedy on the basis of its allegations in this case is not likely to leave a significant antitrust violation undetected or unremedied.

Associated General Contractors, 459 U.S. at 542.

The Court of Appeals in this case applied the factors discussed in Associated General Contractors to the undisputed facts and found that the petitioners were not proper parties to challenge any alleged lessening of competition in the business of potato processing. The Ninth Circuit correctly noted that the federal government could have challenged the transaction and that other parties could have brought injunctive actions under Section 16 of the Clayton Act. Pet. App. A, 19a. See Monfort of Colorado, Inc. v. Cargill, Nos. 83-1305, 83-2588 (10th Cir. April 23, 1985). The Justice Department in fact investigated the sale to AMPCO and decided not to challenge the acquisition.

Moreover, there were several types of persons who would have been more directly affected had the acquisition in fact been anticompetitive, including

potato growers, purchasers of processed potato products, or existing competitors.[4] If the sale of certain Rogers' assets to AMPCO in fact restrained trade, these three classes of victims would have been directly injured by any resulting lessening of competition. Their failure to assert such claims sheds "doubt on the proposition that these 'victims' were actually harmed at all." Associated General Contractors, 459 U.S. at 542, n.47. For these reasons, there is no likelihood that an antitrust violation would go undetected or unremedied if the petition is denied.[5]

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[4]In fact, potato growers in the Ninth Circuit have previously brought antitrust claims on other occasions when they believed certain potato processors had violated the antitrust laws. E.g., Treasure Valley Potato Bargaining Ass'n. v. Ore-Ida Foods, Inc., 497 F.2d 203 (9th Cir. 1974). Moreover, had the acquisition in fact constituted an unreasonable restraint of trade, the damages suffered by these other potential plaintiffs would have been less speculative than the value of the petitioners' minority interest in the unformed corporation. Buyers of processed potato products would be able to demonstrate readily quantifiable injuries due to higher prices; potato growers, conversely, could establish damages from the lower prices they would argue they received for raw potatoes. An action by a member of either of these groups or by an existing competitor "would encounter none of the conceptual difficulties that encumber" petitioners' claims. Associated General Contractors, 459 U.S. at 541-42.

[5]Petitioners argue, without citing any evidence, that they were the intended victims of the alleged anticompetitive acts. This Court has consistently held that anticompetitive intent by a defendant, standing alone, is not sufficient to confer standing upon a remote plaintiff. Associated General Contractors, 459 U.S. at 537; Blue Shield of Virginia, Inc. v. McCready, 457 U.S. 465, 479 (1982). In view of the undisputed evidence demonstrating the indirect and remote nature of (continued)

C. The Court of Appeals Properly Held that the Complexity Involved in Apportioning Petitioners' Claimed Damages Was a Factor Which Weighed Against Granting Petitioners Standing in This Action.

In Associated General Contractors, this Court determined that:

> the District Court would face problems in identifying damages and apportioning them among directly victimized contractors and subcontractors and indirectly affected employees and union entities.

459 U.S. at 545. This factor militated against allowing the unions standing to challenge the alleged unlawful conduct specified in their complaint. In this case, the Court of Appeals found that if the district court had permitted the case to proceed to trial, it would have faced enormous difficulties in apportioning damages. For that reason, the Ninth Circuit held that this factor also weighed against permitting petitioners' standing to pursue their antitrust claims. Pet. App. A, 39a-41a.

Petitioners concede that they had hoped to acquire an unspecified minority share in a company they hoped to form. Petitioners had yet to identify who all of the co-investors in that venture might be. It was wholly uncertain what interest petitioners would own in the

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petitioners' claimed injury, the Court of Appeals properly determined that petitioners' naked assertion that they were somehow the "intended" victims of the transaction was insufficient to confer standing.

proposed company.[6] The Ninth Circuit properly determined that apportioning damages between the petitioners and other possible claimants would be impossibly complex. Pet. App. A, 39a. Had this case gone to trial and the petitioners prevailed, other co-investors (as well as growers, suppliers and/or actual competitors) might have filed similar and duplicative claims within the statutory period.[7]

Petitioners themselves raise another serious problem making apportionment of the alleged damages excessively complex: whether and how much extra stock or "sweat equity" they might have gained through their performance. The possibility that petitioners may have gained such additional stock creates further complexities:

- what percentage stock interest petitioners' co-investors would have agreed could be earned as "sweat equity;"

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[6]Because there had been no final decision concerning the identity of all co-investors in petitioners' proposed acquisition group, even the so-called minimum ten percent ownership position which petitioners claim they would have received is wholly uncertain.

[7]Petitioners respond, with the benefit of hindsight, that there is now no danger of overlapping recoveries because the venture capital firms have not sued and are prohibited from doing so now by the statute of limitations. As both the Seventh and Ninth Circuits have held, such an "after the fact" determination has no place in a court's analysis whether a potential plaintiff has standing under Section 4 of the Clayton Act. In re Midwest Milk Monopolization Litigation, 730 F.2d 528, 532 (7th Cir. 1984); In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 691 F. 2d 1335, 1342 (9th Cir. 1982), cert. denied, 104 S. Ct. 972, 79 L.Ed.2d 211 (1984).

- over what period of time this "sweat equity" would have been earned;

- what criteria for performance would have been agreed upon in establishing petitioners' rights, if any, to additional "sweat equity;" and,

- whether petitioners would have satisfied those criteria.

These factors make any apportionment of damages in this case exceedingly complex, uncertain and speculative.

Moreover, the Ninth Circuit properly found that there was a real danger of duplicative recovery in this case:

> Because the percentage interest of the stockholders of the potential corporate competitor was uncertain, the assessment of damage to the stockholder interest of the management group would be complex and leave the possibility that other potential stockholders could claim damages to their stockholder interest. This would result in duplication of recovery - for example, if the management group claimed twenty-five percent interest in one suit and the remaining potential stockholders claimed a ninety percent interest. . . . [t]he fact that the composition of the corporation was unknown, and the percentage of stockholdings and relative rights of the potential participants remained uncertain, would create very real problems in apportioning damages. (emphasis supplied)

Pet. App. A, 39a-41a. For these reasons, the Ninth Circuit properly determined that the complexity of apportioning damages and the danger of duplicative recoveries also supported the district court's refusal to confer standing upon the petitioners.

D. Contrary to Petitioners' Assertions, the Court of Appeals Properly Balanced All of the Relevant Factors In Denying Standing to Petitioners

Petitioners place great weight on the Court of Appeals' consideration of the fact that the petitioners held no contract of any sort to acquire Rogers. They argue that the Court required that "all four of the typical factors" be present, "ignor[ing] its own jurisprudence that the four factors . . . are 'typical' and should be considered 'in varying combinations'." Pet. for Cert. at 17. In this respect, petitioners misunderstand the Ninth Circuit's analysis.

The Court of Appeals did find that the petitioners' failure to conclude any agreement with A&B was a factor which supported the district court's decision precluding petitioners' antitrust claims. However, the Ninth Circuit also based its conclusion on the undisputed facts that the petitioners did not have the commitments for the financial resources to acquire Rogers and that the petitioners had no agreement whatsoever on any other significant aspect of the petitioners' proposed purchase; i.e., no agreement with the investors, no agreement with the bankers, no agreement on the percentages of ownership, no agreement on stock rights, and no agreement to form the corporation that was allegedly to make the purchase. Thus, even had the petitioners concluded some sort of agreement with A&B, they still would not have been prepared to follow through with the acquisition. The lack of a contract with A&B was but one proper factor in the Court of Appeals' thorough analysis.[8]

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[8]Petitioners originally claimed that they had in fact entered into a contract with A&B for the purchase of Rogers. AMPCO App. D2-D4. The district court held that there was no genuine issue of material fact concerning petitioners' contract claim and granted A&B's motion for summary judgment on that count. (continued)

II. There Is No Conflict Among the Circuits.

Petitioners argue that this Court should grant the writ in order to resolve an alleged conflict between the Ninth Circuit's decision in this case and the Fifth Circuit's opinion in Industrial Investment Development Corp. v. Mitsui & Co., 704 F.2d 785 (5th Cir. 1983) ("Mitsui II"). In fact, there is no conflict.

Mitsui involved claims by a U.S. company that the defendants had infiltrated and gained control of plaintiff's prospective Indonesian joint venture partner as part of a scheme to restrain trade and monopolize the harvesting and exporting of timber from Indonesia. Under that country's law, a foreign company could not conduct business in Indonesia unless it joined with a local company. For that reason, plaintiff had reached agreement with an Indonesian corporation, and then received a forestry concession. Plaintiff alleged that defendants took control of plaintiff's Indonesian co-venturer and thereafter terminated the joint venture. As a result, plaintiff's forestry concession was automatically terminated.

In Mitsui I, 671 F.2d 876 (1982), the defendants moved for summary judgment on the pleadings, asserting that plaintiff lacked standing. The Fifth Circuit found that plaintiff had satisfactorily alleged its intention and preparedness to enter the business and that it was the direct target of the conspiracy. Id. at 886. More importantly, defendants in that case did not argue, and the Fifth Circuit did not consider, whether the damage claims asserted by plaintiff were speculative. The Supreme Court vacated Mitsui I and directed the Fifth Circuit to reconsider this decision in light of Associated General Contractors. Thereafter,

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Petitioners abandoned this contract claim on appeal and now claim that they were prevented from obtaining such a contract as a result of the alleged unlawful conduct of A&B and AMPCO.

the Fifth Circuit issued a one-page per curiam opinion. See Mitsui II, 704 F.2d 785 (1983).

The Fifth Circuit decision in Mitsui II applied the same factors in determining whether the plaintiff had standing, but to a completely different set of facts. Unlike this case, in Mitsui there was no question concerning the plaintiff's financial wherewithal or its overall preparedness to enter the market. There was no question as to who the participants and stockholders in the venture would be. Plaintiff's claims in Mitsui were neither speculative nor remote. Moreover, in an earlier opinion, the Fifth Circuit correctly observed that plaintiff had signed a joint venture agreement setting forth in detail the rights and responsibilities between the joint venture participants. 594 F.2d 45, 50 (1979). For this reason, any damages could be easily allocated between the prospective participants. Finally, plaintiff in Mitsui had actually obtained a forestry concession and had completed all steps necessary to become a competitor.

Both the Ninth Circuit in this case and the Fifth Circuit in Mitsui were guided by the factors discussed in this Court's opinion in Associated General Contractors. The Courts of Appeal applied these factors to dramatically different factual situations and understandably reached different results. There is no conflict between the Courts of Appeals, and hence there is no need for this Court to grant petitioners' writ.

CONCLUSION

Respondent respectfully submits that the Petition for a Writ of Certiorari should be denied.

Submitted this 24th day of May, 1985.

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APPENDIX A

EXCERPTS FROM CR 127

(PARTIAL DEPOSITION TRANSCRIPT OF GILBERT E. COX, FORMER PRESIDENT OF ALEXANDER & BALDWIN, INC. June 30, 1981, at pp. 9, 24-28, 52, 73).

Q. . . . Exhibit 110, which appears to be a copy of letter dated July the 25th, 1978 from --

A. Uh-huh, Delgety.

Q. -- Delgety to you. Do you recall receiving that letter?

A. I do.

Q. Had you had any communications with Delgety prior to the receipt of that letter?

A. None. This came out of the blue.

Q. What did you do after you received that letter?

A. Sometime after the July Board meeting, I asked Mr. Ray Evans to get in touch with Mr. Stuart, who is the signatory on this letter, and set up a meeting with him the next time that Mr. Evans was to be in San Francisco and I am not sure whether that meeting was Mr. Evans alone or whether he had somebody else with him.

They did have such a meeting in San Francisco.

* * *

Q. * * * Can you tell me how long the meeting lasted with Mr. Gardiner in, at his office in San Mateo in late August of '78?

A. I would guess about two hours.

Q. What do you recall at this time concerning the discussions that you had with Mr. Gardiner at that meeting?

A. There was . . . a lot of discussion about the philosophy of Delgety, how they had started, this is a British company, as you know, this is their American subsidiary.

He told me a lot about the company, what they were trying to do in the way of growth in the United States, to some extent in Canada.

We discussed the Rogers operations. He was intensely interested.

I gave him orally what I had spelled out in the letter to him earlier in August and he indicated that they would have to look at it, that obviously he would have to get approval from the parent board in London, but all in all, he was very receptive and very desirous of doing a deal along the lines that we talked about.

. . .

Q. And then on November the 2nd of 1978, Mr. Cox, did you receive a letter from Mr. Gardiner informing you that Delgety did not wish to proceed with the acquisition?

A. I received such a letter, the date I guess is on this letter.

Q. I hand you what we identified previously as Exhibit 123 to this deposition?

A. Yes.

Q. You recall receiving that letter from Mr. Gardiner?

A. Yes, I do.

. . .

Q. Did Mr. Gardiner inform you of any reasons why Delgety had decided not to proceed with the acquisition of Rogers Foods, other than what is set forth in Exhibit 123?

A. No. It was a pretty firm turndown. There was no point in discussing it.

* * *

A. That subject, as indicated in that memo, came up at the end of our review session with the Rogers people and I think I said and I think anybody has said when they had been asked the question, Mr. Evans and Mr. Ulyshen, look, if you guys can come up with a firm deal that will enable us to achieve our objectives, obviously, we will talk to you. Nobody is going to cut anybody off.

* * *

A. That Justice asks for in one of these, if they want to raise a question.

Q. What did you do after you received that communication from --

A. I gave it to Mr. Evans and I said, "comply as best we can."

APPENDIX B

EXCERPTS FROM CR 128

(PARTIAL DEPOSITION TRANSCRIPT OF B. RAY EVANS, FORMER VICE-PRESIDENT, FINANCE OF ALEXANDER & BALDWIN, INC. September 1, 1981, at pp. 115, 304-305, and Excerpts from Exhibit 232)

* * *

Q. Which was your intent to sell the entire company as an ongoing operation, is that correct?

A. It was our statement that that was our desired goal.

Q. Can you tell me, sir, what the last two pages of this Exhibit 232 are, that is, pages 1345 and 1346?

A. The last pages are a compilation of all of the companies we have just reviewed individually, what their general interest was, and as to whether -- to restate, as to the status of that particular company's or party's interest.

* * *

EXHIBIT 232

	Area of Interest			
	All	Garlic	Onion/ Potato	Status
Knut Andersen (Swiss)		X		Open
Con Agra (Touche Ross)		X		Open
Rich-Seapack		X		Open
Ingredient Tech.		X		Pre-negotiation
Ampco			X	Negot. agreement
Cal-Compack		X		Open
Ciba-Geigy		X		Pre-negot.
Corp. Finance Assoc.		X		Open
Cartapaesi Farms		X		Pre-negot.
First San Francisco (broker)	X			Assets at distressed Pr.
Dalgety	X			Potato bus. not good
Nestles		X		Pre-negot.

	Area of Interest			
	All	Garlic	Onion/ Potato	Status
Williams, Rossi, White	X			Broker-Fishing (Japan)
Foremost Foods		X		Competi-tor
Hunt Wesson Foods	X			Rejected
Lane Archibald Assoc.	X			Rejected
Baltimore Spice		X		Dead
Carl Marks (Camlden)	X			Rejected
Hansen Indus-tries (Lapard)	X			Rejected
Idaho Fresh Pak		Rexburg		-
Idaho Supreme		Rexburg		-
Gary Jensen	1/2		1/2	Dead
Management Grp.	X			Lack Financial Ability
Milwaukee Cheese		X		Dead

	Area of Interest			
	All	Garlic	Onion/ Potato	Status
PHO International	X			Dead
Lane Van Orden (Touche)	X			No Interest
Shorax (Waiburg)	X			No
Peter Wagstaff	X			Distress sale basis
Universal Foods		X		Pre-negot.

All	12-1/2
Onion/Garlic	13
Potato	3-1/2
TOTAL	29

A. * * * However, our attitude was such that we -- A&B -- were willing to do whatever the Justice Department told us to do. We therefore sought to cooperate in every way, supply them all of the information, and, as I indicated, on many occasions if the Justice Department told us that the sale was proper and allowed it to go ahead, we would sell. If they advised us not, we would not. And we took comfort in having the Justice Department reviewing this for that reason.

APPENDIX C

EXCERPTS FROM CR 128

(PARTIAL DEPOSITION TRANSCRIPT OF RONALD O. BUBAR, FORMER PRESIDENT OF ROGERS FOODS INC.
May 26, May 27 and July 30, 1981, at pp. 18, 79-80, 169-170, 277-278, 303).

Q When was your first contact with anybody from the Justice Department?

A I don't recall the exact date. The latter part of January or early February. That contact was in San Francisco, I don't recall the exact date.

Q You came to San Francisco around that time?

A That's correct.

Q Did somebody request that you do that?

A Yes.

Q Who?

A Mr. Ray Evans, Executive Vice President of Alexander & Baldwin.

Q All right. What happened at the meeting in San Francisco?

A I was asked a series of questions relating to the business of Rogers Foods, the financial position of Rogers Foods. Questions concerning the industry and the market place.

Q Where was the meeting?

A It was held in the Justice Department Building.

Q 450 Golden Gate Avenue?

A I believe that's correct.

Q The Federal Building in San Francisco?

A Yes.

* * *

Q Mr. Evans never did anything to discourage you from supplying the categories of information the Justice Department asked for, did he?

A No.

Q And I take it nobody else at A & B did anything to discourage you from supplying it either, is that correct?

A That's correct.

Q Now, after the conference telephone call, what did you do, did you at sometime decide that you ought to supply the affidavit or affidavits?

A Yes.

* * *

Q Let's talk about Dalgety and the possibility of their purchase of Rogers Foods in some more detail: From whom did you first learn about the discussion of possible sale of the Rogers Foods Company to Dalgety?

A Mr. Griesedeick.

Q When was that?

A It would have been late July or early August.

* * *

Q When was your next communication with anybody from Alexander & Baldwin about the possible management purchase of Rogers Foods?

A During the latter part of December, sometime between Christmas and New Years.

Q Who was it you talked to then?

A He stated that Alexander & Baldwin was prepared to give management a set purchase price for the stock of Rogers Foods.

Q And did he give you a purchase price?

A Yes.

Q What was it?

A It was $13.5 million.

* * *

Q Can you tell me what else was said about the possibility of management purchasing the company during this late December telephone call?

A He said the $13.5 million would have to be in cash, no paper money.

* * *

Q Now, earlier you testified that when you spoke to Mr. Evans after the January 9 meeting in which you discussed possible management purchase, he came back and told you that he was talking to AMPCO and so on and so forth, you said he offered the Onion Division to Nowatzki and yourself. Do you recall his exact words?

A I do not recall his exact words, I can paraphrase it if you would like. What he said was that I ought to

take a look at the Onion Division. He said it is not large enough for the entire group, but it would be something that probably would fit Mr. Nowatzki and I.

* * *

Q You did testify earlier about your conversation with Mr. Evans about the Department of Justice. And, as I recall, I asked you then about the instructions, if any, Mr. Evans had given you. And you testified that he told you to gather information that the Justice Department had requested, is that right?

A That's correct.

Q Now, did he or anybody else from Alexander & Baldwin ever do anything to impede the gathering or preparation of information for transmittal to the Justice Department?

A To my knowledge?

Q To your knowledge.

A No.

Q Did anybody else at Rogers Foods ever suggest to you that A & B's people were in any way interfering with or impairing your ability to gather together the information that the Justice Department had requested?

A No.

APPENDIX D

(EXCERPTS FROM COMPLAINT, FILED JANUARY, 1980, CR 1, at pp. 1, 9-11)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

RONALD O. BUBAR, DONALD J. NOWATZKI, WILLIAM M. BARTH, CHARLES W. HOUPT, and JOHN J. NETTERBERG,	)	
Plaintiffs,	)	
vs.	)	COMPLAINT FOR TREBLE DAMAGES UNDER THE ANTI-TRUST LAWS, FOR DAMAGES PURSUANT TO COMMON LAW, FOR INJUNCTIVE RELIEF
AMPCO FOODS, INC., a California Corporation; ALEXANDER & BALDWIN, INC., a Hawaii Corporation; and ROGERS FOODS INC, a Delaware corporation,	)	
Defendants.	)	DEMAND FOR JURY TRIAL

Plaintiffs allege as follows:

JURISDICTION

1. This is a civil action under the antitrust laws for treble damages and costs of suit, including a reasonable attorney's fee, and under the Court's diversity and pendant jurisdiction for common law breach of contract and common law interference with business relationships.

* * *

31. In the latter part of 1978, A&B determined to divest itself of Rogers. A&B announced that it was seeking offers for the purchase of Rogers.

32. The president and other officers of A&B encouraged plaintiffs, the management group of Rogers, to attempt to purchase Rogers. The A&B officers stated that it was A&B's goal to sell the company as a complete entity, in order to preserve the employment of Rogers' personnel. A&B's vice-president for finance informed plaintiffs that the outstanding capital stock of Rogers could be purchased for a price of 13.5 million dollars. The said vice-president for finance stated that if the plaintiffs' group could meet that offer, they could acquire Rogers, regardless of other offers.

33. In January of 1979, the plaintiffs accepted A&B's offer to sell Rogers. The terms of said acceptance were in conformance with the terms which A&B officers had previously told plaintiffs would be required to acquire the company. The plaintiffs' proposal would have resulted in a net of $13.5 million paid to A&B.

34. Plaintiffs made the foregoing response to A&B at a meeting on January 9, 1979. Present at the meeting were A&B's vice-president for finance, A&B's corporate counsel, an executive vice-president of A&B, the plaintiffs Bubar and Nowatzki, and a representative of one of plaintiffs' investment bankers.

* * *

EFFECTS OF THE VIOLATIONS

38. The intended and actual effects of the aforesaid conspiracy in restraint of trade, conspiracy to monopolize, monopolization, and attempt to monopolize in violation of Sections 1 and 2 of the Sherman Act, have been and are:

(a) Plaintiffs would have purchased the outstanding capital stock of Rogers, but for the defendant A&B's agreement with Ampco. The defendants' said course of action has excluded and eliminated competition from the market of a principal competitor of the defendant Ampco;

(b) Competition in the distribution and sale of dehydrated potato granules and granule-based products in the United States has been severely restrained and impaired;

(c) Competition for the purchase of fresh and process grade potatoes in Eastern Idaho and in the Columbia Basin of the States of Washington and Oregon has been severely restrained and impaired;

(d) The defendant Ampco has obtained a monopoly in a significant portion of the market for the sale of dehydrated potato products to the food service industry in the United States;

(e) The public has been and is being denied the rights and benefits of free competition in the distribution and sale of dehydrated potato products in the United States and in the purchase of fresh and process grade potatoes in Eastern Idaho and in the Columbia Basin of Washington and Oregon.

39. The actual effect of the aforesaid acquisition by defendant Ampco of the potato division assets of Rogers has been to substantially lessen competition or tend to create a monopoly in the distribution and sale of dehydrated potato products in the United States and the purchase of fresh and process grade potatoes in Eastern Idaho and in the Columbia Basin of Washington and Oregon.

* * *

41. A&B's actions in selling the assets of Rogers' potato division to Ampco, after plaintiffs had accepted A&B's offer to sell the outstanding capital

stock of Rogers, constitutes a common law breach of contract by A&B.